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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 758

RONALD E. GATES,
Petitioner,

vs.

P. F. COLLIER, INC., a Delaware Corporation,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Supreme Court of the United States:

Petitioner prays that this Court grant a rehearing of its Order of January 15th, 1968 denying the Petition for Writ of Certiorari and that Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case as prayed for in the petition docketed herein by petitioner on October 23rd, 1967.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Petitioner respectfully believes and submits that the denial of the Petition for Writ of Certiorari may have been due to respondent Collier making a gross and substantial misstatement of fact in its Brief for Respondent filed herein November 21st, 1967, hereinafter more particularly pointed out and thereby clouding the state of the record before the United States District Court of Hawaii (trial court) and the United States Circuit Court of Appeals of the Ninth Circuit (appeals court) with respect to the following paragraph XIX of the new 1960 Treaty between Japan and the United States (effective June 22nd, 1960):

"ARTICLE XIX

1. Members of the United States armed forces, the civilian component and their dependents, shall be subject to the foreign exchange controls of the government of Japan.

2. The preceding paragraph shall not be construed to preclude transmission into or outside of Japan of the United States dollars or dollar instruments representing the official funds of the United States or realized as a result of service or employment in connection with this agreement *by members of the United States Armed Forces and the civilian component,* or realized by such persons and their dependents from sources outside of Japan.

3. The United States authorities shall take suitable measures to preclude the abuse of the privileges stipulated in the preceding paragraph or circumvention of the Japanese foreign exchange controls."

Throughout the entire trial (April 18 to 22nd, 1966) (Tr. 678-a) in the trial court petitioner was not aware

that such a Treaty existed between the United States and Japan. Appellee Colliers was also unaware of the said Treaty in that it also did not throughout the trial mention the Treaty. Nowhere in the entire transcript of record of 687 pages or the 718 pages of Record of Appeal is the Treaty mentioned. The trial court therefore did not have the benefit of Article XIX of the treaty provisions of 1960.

Unaware of Article XIX of the said 1960 Treaty the trial court held with relation to encyclopedias sold to servicemen by Collier's branch in Tokyo and payments made to Collier's office in Tokyo who in turn sent it to New York, as follows:

> Plaintiff further urges that the transfer of dollars received from U. S. servicemen on sales to the military and the direct transfer of those dollars out of Japan to New York violated J.F.E., Chapter V "Restrictions and Prohibitions"—Section I "Payments", Article 27 (1) and (2), and Section V "Others", Articles 42 and 45.[5] *It would appear from the words of the statute*

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5. "Article 27. Unless authorized as provided for in this Law or in Cabinet Order, no person shall in Japan:

(1) Make any payment to a foreign country;

(2) Make any payment to an exchange non-resident or receive any payment from an exchange non-resident; * * *"

"Article 42. Unless authorized as provided for by Cabinet Order, no person shall contract for services involving payment, settlement or any other transaction governed by the provisions of this Law."

"Article 45. Unless authorized as provided for by Cabinet Order, no person may export or import means of payment * * * documents embodying rights to claimable assets."

"Chapter I, Article 6 (Definitions)

* * *

(5) 'Exchange residents' shall mean all natural persons who have their permanent place of abode or who customarily live in Japan, and also juridical persons (corporate bodies, enterprises), having their seat or place of administration in Japan. The branches in Japan (agencies, establishments, etc.) of exchange non-residents are considered to be exchange residents irrespective of whether they are independent in law or not and even if the place of their administration or their headquarters is located abroad.

that its terms are broad enough to include these payments. This court is all too familiar with the legal complexity of the problems of construction of statutes.[6] The J.F.E. was first promulgated December 1, 1949. This court takes judicial notice that Americans in military service have been stationed in Japan since 1945 and this court may legally presume that from that time to 1962 that U. S. dollars have been sent out of Japan to the U. S. for purchases by servicemen similar to those involved here. This court likewise can and does presume that there must be Japanese cases or administrative opinions which set out and construe the definitions, restrictions and prohibitions referred to. This court, however, has not been furnished by the plaintiff with any such proof as to whether or not the sections referred to do in fact under the law of Japan prohibit the type of dollar transaction covered here by the sales to the U. S. military. It is impossible for this court to determine the legal application of the broad words of that law to the particular facts of this case, in the absence of proof by Japan case law or administrative opinion.[7] (Emphasis ours)

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(6) 'Exchange non-residents' shall mean all persons, natural or juridical, other than those falling under the meaning of exchange residents.

(7) 'Means of payment' shall mean bank notes, Treasury notes, small paper money, coins, checks, bills of exchange, money orders, letters of credit and other orders for payment.

(8) 'Foreign means of payment' shall mean money in foreign currency and other means of payment as specified in the preceding item which are expressed in foreign currency or payable abroad irrespective of the currency in which they are expressed.

* * *

(13) 'Claimable assets' shall mean time deposits, demand deposits, insurance policies and claims, balances in current account, any claims to be paid such as arising out of loans or bids or any other claims, expressed in terms of money insofar as they are not embodied within the meaning of other items of this Article."

6. Cf. Re Castro, 44 Haw. 455, 355 P.2d 46 (1960).

7. Telesphore Couture v. Watkins, D.C.E.D.N.Y. 1958, 162 F. Supp. 727.

Since Article XIX of the Treaty permitted U. S. military personnel to send U. S. dollars direct to the United States it is necessary to search the record below as to what was the status of the testimony or record in this regard. In Appellee Colliers' answer to "Interrogatories No. 2 under Rule 33" under interrogatory 23, the question was as follows:

> "23. Explain in your own words how the 96B military accounts were collected." (Rec. 123)

The above question was answered in accordance with Rule 33 under oath before a New York notary by Simon J. Nork, Collier's Assistant Secretary as follows:

> "23. Prior to April 15, 1960, United States Military Personnel purchasing Collier's Encyclopedia made payments directly to P. F. Collier & Son Corporation in New Hyde Park, New York, U.S.A. United States Military personnel purchasing Collier's Encylopedia from April 15, 1960 through March 31st, 1962, made payments to plaintiff (Ronald E. Gates), who remitted the same to New Hyde Park, New York, U.S.A. Beginning April 2, 1962, United States Military Personnel reverted to the system of payment which had existed prior to April 15th, 1960." (Rec. 171-172)

It was stipulated that these answers may be accepted by the court as evidence. (Tr. 295-297) And the same Collier officer, Simon J. Nork, testified during trial under oath that dollar sales received from military personnel in Tokyo were treated as follows:

> "Q. Were the dollars deposited in the Tokyo account?
> A. No, the dollars were sent to New Hyde Park, Long Island." (Tr. 81)
>
> * * *
>
> "Q. (By Mr. Kashiwa) The dollar deposits were made at what bank?
> A. The Long Island Trust." (Tr. 81)

Counsel for Colliers, appellee well knew the above to be the record and testimony but for some reason he misrepresented to this court at page 4 of Brief for Respondent, filed herein on or about November 21st, 1967, as follows:

> "All dollars received from American Military Personnel were to be sent directly to New York. (PX 6; Tr. 119)"

In fact, reference to (Tr. 119) which means transcript at page 119, shows to the contrary. Simon J. Nork, an officer of Colliers testified that collections were made in Tokyo on military accounts up to March 1st, 1962, but thereafter the amounts were sent direct by the military patrons to New York. The testimony was as follows:

> "Q. (By Mr. Kashiwa) Let me show you Exhibit No. 6. You are familiar with that document?. (Showing document to the witness) This is in evidence.
>
> A. Yes, I signed it.
>
> Q. And it was signed by Gates?
>
> A. Yes, in Sydney, Australia.
>
> Q. Was it signed in your presence?
>
> A. Yes.
>
> Q. The date of this is March 1st, 1962?
>
> A. That's right.
>
> Q. This is with relation to the collection of military accounts?
>
> A. Correct.
>
> Q. Up to this time Gates collected it?
>
> A. Correct.
>
> Q. And subsequent to that date, effective April 1st, you started to collect?
>
> A. We started to collect from Stateside, notified the military to send the payments directly to us instead of to Gates.
>
> Q. You mean the military patrons?
>
> A. Yes, the dollar accounts."

The above is exactly what Mr. Nork said in his above quoted answer to interrogatory No. 23. It is difficult to believe that counsel will make such a misleading statement and refer to a portion of the transcript which stands for something entirely contrary. Therefore there was no dispute below in the testimony and record by admission that between April 15, 1960 through March 31st, 1962 Colliers Tokyo Branch through petitioner collected the military sales and sent the U. S. Dollars from Tokyo to New Hyde Park, New York. The trial court in its decision accepted the undisputed Nork statement and testimony and found as follows:

> "* * * The Tokyo branch was to handle accounts collected there on two different bases. When you were to be paid, it was on a 12 month contract basis, and when dollars were to be paid, the collection was on a 24 month basis. All you received were to be deposited in Collier's 'Japan Branch' account in Tokyo. *Dollars collected in Tokyo were to be remitted directly to New York.*" (Emphasis sup.) (Appendix D attached to Petition for Writ of Certiorari, pages D3-D4)

The Circuit Court of Appeals contrary to the above record and testimony and the findings of the trial court found that payment for these dollar sales to military personnel were sent direct by the military personnel to New York as follows:

> "* * * During the operation of the contract, United States armed forces personnel in Japan were billed directly for books received by them and *payment was made in dollars direct to New York.* No Japanese permits for these payments were obtained." (Emphasis supplied) (page A3, appendix to Petition for Certiorari filed herein)

The court then cited Article XIX of the 1960 Treaty and held that the decision below was manifestly correct because of said Article XIX.

It is submitted that under the findings of the trial court and the testimony and admissions under oath by officer Simon J. Nork of Colliers, the facts were conclusive that petitioner Gates as manager of Colliers Tokyo Branch collected these funds in Tokyo from military personnel and then remitted said sums to New Hyde Park, New York. The findings of direct transmission by military personnel to New York as made by the Court of Appeals finds no support in the record. In fact Collier appellee in its "Brief for Respondent" filed herein at page 11 refers to the Ninth Circuit remarks as follows:

> "The Ninth Circuit remarks are clearly dicta and cannot be considered rulings on a treaty and foreign statute necessitating this Court's review."

Therefore between June, 1960 to April, 1962, the funds were illegally transmitted out of Japan by Collier's branch in Tokyo because Collier's branch in Tokyo obviously could not be a member of the United States armed forces, a dependent or a civilian component of our armed forces.

Furthermore the last paragraph of said Article XIX of the treaty reads as follows:

> "3. The United States Authorities shall take suitable measures to preclude the abuse of the privileges stipulated in the preceding paragraph or circumvention of the Japanese foreign exchange controls."

It is submitted that this Court should uphold the Treaty as one of the "United States Authorities" mentioned in said paragraph. This Court must take "suitable measures" to prevent circumvention of the Japanese exchange con-

trols, the very thing Colliers attempted to do and did do in this case.

It may be argued by appellee that since military personnel may remit to New York $269.50, the selling price of a set of encyclopedia, why can't Colliers Tokyo branch, send the same $269.50 which it collects from military personnel? The answer is that Colliers Tokyo needed a license to send out of Japan to the United States any funds. On a set of encyclopedia sold in Japanese yen it was licensed to send out in United States Dollars only $172.50. Why would Collier's Tokyo branch be licensed to send out $269.50 in U. S. Dollars to military personnel when 34% or $84.83 was immediately due Gates, petitioner herein, under the contracts of April 15, 1960 and September 15th, 1961. Collier's Tokyo would be then sending out more money than its share of the $269.50 (total price). Gates, being a Tokyo resident, cannot send out his own $84.83 without a license.

Since the writing of the original petition for writ of certiorari filed in this cause in October, 1967 events in this world have changed a great deal. Exchange controls are being already imposed by our Department of Commerce to prevent further imbalances in our international trade. Japan is already under strict exchange control. The United States is being required to impose restrictions and regulations similar to that discussed are being adopted by the United States. It is submitted that therefore the subject submitted herein is not only a timely one but one of great importance in current international trade.

CONCLUSION

For the reasons set forth above and in its petition for a writ of certiorari, it is respectfully urged that rehearing

be granted and that, upon such rehearing, a Writ of Certioari issue to the Court of Appeals of the Ninth Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this court.

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